Supreme Court, U.S.
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No. 99-1210

In The

Supreme Court of the United States

PETER NOORILY and RAYMOND P. NASTAWA,

Petitioners,

-and-

SIDNEY LEVY,

Petitioner,

-and-

WILLIAM O. DECK,

Petitioner,

v.

THOMAS & BETTS CORPORATION and EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Third Circuit erred in ruling that in an ERISA welfare benefit plan whose terms allow for the terminating manager to exercise business discretion to grant severance benefits only when the manager determines they are appropriate, the manager may deny such benefits to Petitioners who refused to relocate with their jobs, because the manager determined it was not appropriate to grant severance to key personnel that the Company believed were critically needed.

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STATEMENT OF THE CASE

Petitioners have presented a distorted recitation of both the facts and the law. The Third Circuit's unanimous decision is in complete harmony with all other Courts of Appeals relating to this subject. The decision is also in harmony with United States Supreme Court precedent. There are no conflicts between the Third Circuit's opinion and the Supreme Court's teachings.

This is a case brought exclusively under 29 U.S.C. § 1132(a)(1)(B) of the Employment Retirement Income Security Act (ERISA) arising out of a decision by Thomas & Betts Corporation (hereinafter "T&B" or "Company") to relocate its Electrical Division from New Jersey to Memphis and the Company's determination that two groups of key employees (product engineers and product managers) – approximately 35 of 200 employees at Division headquarters – were essential to the operations of the Division and, as such, their positions would be relocated. The single purpose of T&B's severance plan was "to assist former employees in maintaining their standards of living while securing new employment." The plan was not intended to operate as a reward for service but only as a financial bridge if the employee was terminated, not if the employees left on *their own terms*. The terms of the plan provided for payments of benefits only when the termination was "involuntary" and the terminating manager determined that the "granting of such pay [was] appropriate." (App. B at 16a).

In this case, the terminating manager was the President of the Company who determined that severance would not be paid because he considered these

employees to be "key" employees and determined that it was in the Company's best interest that they remain. As the Third Circuit noted, the decision was impartial and there was no discriminatory motive. (App. B at 26a). The Third Circuit recognized that it was equally undisputed that the manager considered these engineers vital to the Company and vital to the consummation of T&B's anticipated acquisition of American Electric, a manufacturer of electrical products and accessories headquartered in Memphis. (App. B at 21-22a, n.5).

Although it originally anticipated in early December, 1991, that the two groups would relocate essentially intact, Company management learned by the end of that month that at least a majority of the engineering group, unlike the product managers (all of whom relocated), were expressing reluctance to make the move. Management believed that it was crucial for these groups to relocate. Otherwise, the Company would either have had to dislocate its engineering department from the rest of the Division, or go to Tennessee with a decimated engineering department – results that the Company perceived would seriously threaten the welfare of the Company and all of its employees.

The Court of Appeals properly held that there was nothing inappropriate or arbitrary about the Company's decision not to encourage employees it regarded as critical from terminating their employment. In doing so, the Third Circuit, in carrying out its plenary review, concluded that the District Court's characterization of the terminating manager's determination to withhold severance pay as "punitive" was legally erroneous. (App. B at 24a). As the Third Circuit noted, Petitioners were being

actively solicited by the Company to be *retained*, not *discharged*, by the Company. (App. B at 26a).

Contrary to Petitioner's assertion, the decision does not in any manner encroach upon the protection given employees for welfare benefits. Indeed, the Third Circuit's holding is consistent with the objectives for which ERISA was enacted. The decision acknowledges the need for flexibility in these kinds of plans – a flexibility mandated by Congress and by all of the Circuits designed to *encourage* plan formation – that Petitioners have completely ignored.

Because the Third Circuit confirmed that it had plenary review, its conclusions with respect to the proper application of ERISA law to the facts and actual circumstances surrounding that plan are conclusive. *DiFederico v. Rolm Co.* ___ F.3d ___, 2000 WL 31797 (3rd Cir. 2000); *Sandoval v. Aetna Life & Cas. Ins. Co.*, 967 F.2d 377 (10th Cir. 1992); *Hamilton v. Air Jamaica, Ltd.*, 945 F.2d 74, 77 (3rd Cir. 1991), *cert. denied*, 503 U.S. 938 (1992).

However, in an effort to factually blur the record and camouflage the legal distinction that the Third Circuit in this case and other Circuits have clearly established, Petitioners have made a number of misstatements regarding the record and the Third Circuit's rulings, matters which are central to this litigation. Petitioners had not "accrued" any rights as they suggest (Pet. Br. at 4); this case deals with a welfare benefit plan, which has been very deliberately exempted from the statute's funding (29 U.S.C. § 1081(a)(1) and vesting (29 U.S.C. § 1051(1)) requirements. Benefits such as these do not "accrue." Contrary

to Petitioners' statement, there was no evidence that management was "taking out its frustrations" by "depriving" these Petitioners of benefits. The Court of Appeals found that this was a case involving "nothing more than an employer determining that it is not appropriate to grant severance benefits to employees leaving their employment when the employer wishes them to remain." (App. B at 26-27a).

Likewise there was no evidence that the Company had any "longstanding practice" to pay benefits to employees in this kind of situation; even the District Court observed, which the Third Circuit acknowledged, that the Company had never been faced with this kind of situation before (App. F at 64a). And, as the Third Circuit noted, this was a perfectly acceptable decision for the manager to make in a situation where the Company was doing anything *but* setting these employees adrift (App. B at 26-27a).

Significantly, Petitioners have also seriously misstated and distorted the language and operation of the plan. Petitioners persistently, but inaccurately, describe the Company's terminating manager as the "administrator." The Third Circuit ruled that the plan had explicitly given discretion to determine eligibility to T&B "through its terminating manager rather than to an administrator through its Corporate Benefits Committee." (App B. at 17a). It also determined that the Company could create a plan that furthered its business interests by retaining discretion to determine eligibility according to the plan's terms. In this case, the plan was structured from the outset to provide for an award of severance benefits only

if the termination was involuntary and the "terminating manager", not the administrator, determined that the "granting of such pay [was] appropriate."[1]

Petitioners also misstate the Third Circuit's ruling in an effort to support its accusation that the court had established a "new standard." In its quotation from the decision, Petitioners deliberately truncate the court's statement that an employer does not act as a fiduciary "when designing a plan or making business decisions *allowed for by a plan* . . . "[2] This is not a generic matter of "making business decisions" as Petitioners would have it, but of making business decisions *allowed for by the plan*. The Third Circuit has not developed a "new standard." The legal standard it applied is the same standard that every Circuit that has addressed the question has applied, *infra*, pp. 13-15.

While Petitioners may not agree with the ruling, to claim that the Third Circuit has established a "new standard" is disingenuous. It is the Petitioners that have attempted to create a "new" standard, one that makes each employee's personal predelictions paramount to any considerations for the welfare of the Company, the sustainability of the plan itself, or the employee workforce as a whole. Petitioners' standard would effectively give employees a license to always recover. Consequently, it

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[1] Section 5.2 of T&B's "Electrical [Division] Human Resources Policies & Procedures"

[2] Petitioners omitted the words emphasized above, language expressly inserted by the Third Circuit in its Order of October 18, 1999 amending the August 25, 1999 opinion (App. A at 4a).

would utterly foreclose a sponsor's ability to provide for the exercise of *any* discretion, a momentous deviation from the plan's terms and one that would greatly defuse employers' incentives to establish and operate such plans.

Petitioners make further misstatements. Because T&B's terminating manager gave *any* consideration to the Company's business interests, Petitioners say, it means that it acted with "total disregard" for the Petitioners. In this case, 35 out of 200 employees who were employed at the Company's Electrical Division headquarters were designated to be key to the Company and their jobs were to be relocated. In making its decision the terminating manager's determination of the importance of this group of engineers was undisputed and the expression of need for Petitioners was genuine (App. B at 24a). Although Petitioners label the determination to be "heavy-handed," this determination was made out of an undisputed perception of necessity, (App. B at 21-22a, n.5), accompanied, as the court noted, by the Company's offer of not only continued employment and benefits, but significant incentives in connection with the relocation. (App. B at 26a).

The determination was hardly to achieve pecuniary gain. Not only did T&B offer these incentives to Petitioners, it also paid severance to over 150 employees who did not relocate and who the Company believed it did not absolutely have to retain. Petitioners received their pension, plus an opportunity to work in transition.

Petitioners' positions did not change and their functions and duties were to remain exactly the same. There

was no proof – indeed there were no allegations – that the conditions at their relocated position would be any different and certainly none that these conditions would be intolerable. The Third Circuit recognized that the Company had "in no sense established oppressive or intolerable conditions" and was not an "uncaring employer." (App. B at 26). And, of course, as the Third Circuit noted, there was no proof or evidence that the Company had pretextual motives or was acting in a discriminatory manner. *Ibid.*

REASONS FOR DENYING THE WRIT

Petitioners' heavily fact-laden claim that the court below erred does not warrant review. The decision below was a plainly correct application of settled law, and – contrary to Petitioners' wrongful characterization – there is no conflict among the Circuits or with the rulings of this Court.

It is well-established by this Court that the courts will develop a "federal common law of rights and obligations under ERISA-regulated plans." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Pilot Life Ins. Co. v. Dendeaux*, 481 U.S. 41 (1987). In creating this body of law the Circuit Courts and this Court have all held that a Company can *structure* a plan in any way it sees fit; ERISA mandates no minimum substantive content for employee welfare benefit plans. *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996); *Shaw v. Delta Air Lines*, 463 U.S. 85, 91 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981); *McGath v. Auto-Body North Shore*, 7 F.3d 665

(7th Cir. 1993); *McGann v. H&H Music Co.*, 946 F.2d 401 (5th Cir. 1991) *cert. denied sub nom. Greenberg v. H&H Music Co.*, 506 U.S. 981 (1992).

The courts have also universally ruled that companies, acting as settlors, may write plans with wide discretion for management to make determinations affecting "who is entitled to receive plan benefits and in what amounts, or how such benefits are calculated." *E.g., Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 119 S. Ct. 755, 763 (1999); *Alessi*, 451 U.S. at 511; *McNab v. General Motors Corp.*, 162 F.3d 959 (7th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 1762 (1999); *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279 (3rd Cir. 1988).

As Petitioners have acknowledged, there is virtual unanimity among circuit court opinions that, where an employer initially *structures* a welfare benefit plan, or, when it later amends the plan, the employer is not acting as a fiduciary. *See, e.g., Hughes Aircraft*, 525 U.S. 432, 119 S. Ct. at 765 (fiduciary duty not implicated where employer determines the structure of Plan); *Curtis-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) (under ERISA employers "are free for any reason at any time, to adopt, modify, or terminate welfare benefit plans"); *Joanou v. Coca-Cola Co.*, 26 F.3d 96 (9th Cir. 1993); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162 (3rd Cir. 1990) ("employer's decision to amend or terminate employee benefit plan is unconstrained by fiduciary duties"); *Adams v. Avondale Industries, Inc.*, 905 F.2d 943, (6th Cir. 1990) (employers not subject to fiduciary standards when amending welfare benefits plan); *Hickman v. Tosco Corp.*, 840 F.2d 564 (8th Cir. 1988); *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 665 (6th Cir. 1998) (transfer of retiree's

welfare benefits not subject to fiduciary standards because transfer more analogous to amending than administering); *Izzarelli v. Rexene Products Co.*, 24 F.3d 1506 (5th Cir. 1994); *Johnson v. Georgia Pacific*, 19 F.3d 1184, 1188 (7th Cir. 1994) (promulgating and implementing amendment accelerating vesting of pension for employees upon changes of corporate control without adjusting retirees' benefits, not fiduciary act); *Belade v. ITT Corp.*, 909 F.2d 736, 738 (2nd Cir.1990) (design of employee benefit plan is strictly a business decision and does not give rise to any fiduciary duties under ERISA); *Dzinglski v. Weirton Steel*, 875 F.2d 1075, 1078 (4th Cir.), *cert. denied*, 493 U.S. 919 (1989) ("Congress left employers much discretion in designing their plans under ERISA and in determining the level and conditions of benefits").[3]

Because a company's creation of a plan and its contents is not a fiduciary matter, companies are free to employ standards that leave matters that are inherently business decisions to the unfettered discretion of company managers. In these situations the courts have held that a committee or administrator would have no business making such a determination. *Spink*, 517 U.S. 882 (1996); *Belade*, 905 F.2d at 738; *Hlinka*, 863 F.2d at 283. In this case, the manager's determination that the Company's election to relocate required retention of key

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[3] This is not a case brought against any person or entity for violating fiduciary duties; this is a case brought under 29 U.S.C. § 1132(a)(1). The liability of fiduciaries is governed by 29 U.S.C. § 1109 and accrues only to the plan itself, not to participants suing in their individual capacities. *Hozier*, 908 F.2d at 1162, n.7 (3rd Cir. 1990).

engineering personnel was a business decision that was properly left to management. As the court stated in *Hlinka*: "ERISA was not intended to preclude employers from exercising their business and economic savvy for the interests of the pension plan as well as the interests of the employer." *Id.; see Sengpiel*, 156 F.3d at 666 (fact that employer, in order to effectuate corporate reorganization, randomly assigned employees to spin off division that reduced benefits, not breach of fiduciary duty).

This rationale has been consistently applied by the Circuits. *McNab*, 162 F.3d 959 (using court instead of employer as arbiter of program "would compromise the discretionary nature of the program"); *Holliday v. Xerox Corp.*, 732 F.2d 548 (6th Cir. 1984), *cert. denied*, 469 U.S. 917 (1985); *Trenton v. Scott Paper Co.*, 832 F.2d 806 (3rd Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988) ("it defies common sense to suggest that a corporation must allow a retirement board [instead of corporate management] to make personnel decisions such as determining which plants need fewer employees.")

The determination that severance would be paid when the manager deemed it appropriate was a determination that the Company, acting as settlor, had *structured* into the plan.[4] It is a reservation that is "part of the written promise and a limitation upon it." *Hamilton*, 945 F.2d at 78.

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[4] The Court of Appeals also seriously questioned whether there were any "involuntary terminations" to even cause this plan to apply. These Third Circuit plenary rulings strongly suggest that the severance policy was inapplicable because, as a matter of law, the policy applied only to *involuntary* terminations.

In these contexts, the statute and the court decisions characterize the employer as a trust settlor, with all concomitant rights and privileges given to such a person, or entity. *E.g., Spink*, 517 U.S. at 891 (1996); *Walling v. Brady*, 125 F.3d 114, 120 (3rd Cir. 1997); *McGath*, 7 F.3d 665; *see Siskind v. Sperry Retirement Program, Unisys*, 47 F.3d 498, 506 (3rd Cir. 1995) (employer considered "participant" in single employer plan); *Blaw Knox Retirement Plan v. White Consolidated Industries, Inc.*, 998 F.2d 1185 (3rd Cir.) *cert. denied sub nom. White Consolidated Industries, Inc. v. Pension Ben. Guaranty Corp.*, 510 U.S. 1042 (1993).

Petitioners concede that an employer is *not* acting as an ERISA fiduciary in exercising its right to design or amend a welfare benefit plan, (Pet. Br. at 9), but insist that carrying out the provisions built into the design is "administration." But management's exercise of plan-furnished discretion is not an administration issue. This Court and the Circuits are unanimous; whether the plan is being amended or whether it involves the original structuring of the plan, these activities are not acts of administration within the meaning of ERISA. If the structure designs functions of business discretion into the plan that are not fiduciary in character, then exercising those functions is not an act of administration. *Hughes Aircraft*, 119 S. Ct. at 764; *Systems Council EM-3 v. AT&T Corp.*, 159 F.3d 1376 (D.C. Cir. 1988); *McNab*, 162 F.3d at 959; *Sengpiel*, 156 F.3d at 666; *Izzarelli*, 24 F.3d at 1524; *Nazay v. Miller*, 949 F.2d 1323 (3rd Cir. 1991); *Berger v. Edgewater Steel Corp.*, 911 F.2d 911 (3rd Cir., 1990), *cert. denied*, 499 U.S. 920 (1990); *Dzinglski*, 875 F.2d at 1080; *Hickman*, 840 F.2d at 567; *Morse v. Stanley*, 732 F.2d 1139 (2nd Cir. 1984);

Jones v. AT&T Co., 798 F. Supp. 1137, 1145 (E.D.Pa.), *aff'd*, 981 F.2d 1247 (3rd Cir. 1992).

In this case, Petitioners' contention – that T&B's manager, in exercising his discretion had to evaluate the employees' *personal* views and desires and subordinate, if not *suppress*, the Company's business objectives and the welfare of *all* the employees, plan beneficiaries, and stockholders – is totally out of touch with reality and with Congress' avowed objectives in keeping these plans flexible. In *Hozier*, the Third Circuit, in an analogous fact situation, recognized that if every company decision to modify a plan constituted "plan administration," all those decisions would have to be made *solely* with the interests of covered employees in mind, and it would be "virtually impossible to see how any decision could pass muster." 908 F.2d at 1159; *see also Nazay*, 949 F.2d at 1330. That situation, the Court said, would be unacceptable and wholly *out* of keeping with ERISA's objectives. *Id.*; *see Siskind*, 47 F.3d at 500 (court concluded that benefit plan would not have been adopted if company's personnel-selection discretion built into plan was eliminated or restricted). Petitioners concede that the company could *amend* its plan at anytime to allow management to withhold severance from key personnel who do not relocate; it is untenable, then, to contend that the Company could not do just that if it were done as a *determination* under a plan with broad discretion.

Business decisions can be made notwithstanding their collateral effect on contingent employee benefits. *E.g.*, *Sengpiel*, at 666; *Dzinglski*, 875 F.2d at 1079; similarly, decisions implementing provisions of a benefit plan can

have incidental, and thus legitimate, benefits to the company, *Hughes*, 119 S. Ct. at 764.

The Supreme Court, and every Circuit that has addressed this issue, have determined that an employer's implementation of discretion given by the plan to make eligibility determinations that are "business in nature" are not reviewable under ERISA's fiduciary criteria, *e.g.*, *Spink*, 517 U.S. at 893; *Ames v. American Nat. Can Co.*, 170 F.3d 751 (7th Cir. 1999); *Walling*, 125 F.3d 114; *Siskind*, 47 F.3d at 506; *Adams v. Avondale Industries, Inc.*, 905 F.2d 943 (6th Cir. 1990); *Dzinglski*, 875 F.2d at 1078; *Berger*, 911 F.2d at 918-19. *Young v. Standard Oil (Indiana)*, 845 F.2d 1039 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988). As the Court stated in *McNab*, "[I]f it is lawful to adopt a plan that gives discretion to senior managers, it must be lawful to *use* that discretion to evaluate what the 'best interests' of a firm are." 162 F.2d at 962 (emphasis in original).

When the plan's structure grants discretion to management to make eligibility decisions allowed for by the plan, the Third Circuit and other Circuits are consistent; they have determined that exercising that discretion is a business decision and not subject to fiduciary standards. *McNab*, 162 F.3d at 960 (nothing violates ERISA law in *adopting* or implementing plan that "leave[s] participation to the discretion of managers" or by uses more flexible *standards* instead of *rules*); *Sengpiel*, 156 F.3d at 666 (implementation not a fiduciary act of administration); *Walling*, 125 F.3d at 120 (since trustees, as settlors, "were free to scrap the plan altogether, they were free to advance non-pension fund interests in making design changes to it"); *Siskind*, 47 F.3d at 501 (refusing manager right to exercise discretion reserved to determine eligibility would have

"effectively eliminat[ed] the program's personnel-selecting objective without which the program would not have been adopted in the first place"); *Nazay*, 949 F.2d at 1329 (employer's determination that employee's failure to obtain treatment certification warranted a penalty was proper because discretion *built into* the plan); *Hamilton*, 945 F.2d at 78 (company permitted to *implement* reservation that employer had structured in plan); *Adams v. LTV Steel Corp.*, 936 F.2d 368, 370-71 (8th Cir. 1991) (company acted as an employer and not as a fiduciary in deciding whether the employee's early retirements were "in the company's interests"); *Belade*, 909 F.2d at 738 (management's decision to deny benefits to advanced technology department was not breach of ERISA's fiduciary obligations because plan structured to allow management to designate *which* of the headquarters departments would be eligible); *Dzinglski*, 875 F.2d at 1075 (plan that shifted the "effective decision to deny benefits" from plan fiduciary to the company upheld); *Hlinka*, 863 F.2d at 284 (company management could deny early retirement to plaintiff because of his "extensive and unique technological expertise"); *Scott Paper*, 832 F.2d at 809 (employer applied discretion to distinguish "overstaffed" plants from "lean" plants). Petitioners have cited no Circuit decisions to the contrary.

In these cases, the courts have recognized that where the plan's terms grant to management, not the administrator, the right to determine whether benefits should be paid, the administrator has no discretion and must abide by management's determination. Accordingly, the administrator's action is not a fiduciary matter. *Siskind*, 47 F.3d at 507 (Committee had "duty" to accept management's

recommendation); *Averhart v. U.S. West Management Pension Plan*, 46 F.3d 1480, 1488 (10th Cir. 1994) ("decision to pay benefits to some inactive employees but not others . . . was a matter of plan design not subject to ERISA's fiduciary standards"); *Adams v. LTV Steel*, 936 F.2d at 370 (LTV "acted as an employer, not a fiduciary in deciding whether the employees' early retirements were in the company's interest"); *Berger*, 911 F.2d at 918 (company "acting in its capacity as employer and not as a fiduciary under ERISA" when it determined that payment of benefit not "mutually satisfactory"); *Dzinglski*, 875 F.2d at 1080 (plan does not permit Retirement Committee to "examine Weirton's decision," nor authorize Committee "to determine Weirton's interest, only to ascertain Weirton's assent"); *Hlinka*, 863 F.2d at 286 (administration had no authority to override management's business decision to deny employee's early retirement benefit because of his extensive technological experience).

Indeed, Petitioners *concede* that in the cases cited as precedent by the Third Circuit the administrators *would* have breached their duties *if they had not followed the manager's determination*. (Pet. Br. at 11). However, Petitioners contend that in those cases the plans *expressly* required the managers to put "the employer's business interests first." The argument is spurious. First of all, the criteria used in all these cases was broad and flexible. A determination by the President of the Company that it is appropriate to retain and relocate key technical personnel and not to use the benefit to discourage such action is certainly not dissimilar from a standard of "best interests." Second, the criteria used in this plan is the equivalent of the general criteria used in plans upheld in a

string of Court of Appeals cases. *Murphy v. International Bus. Machines*, 23 F.3d 719 (2nd Cir.), *cert. denied*, 513 U.S. 876 (1994) (upholding denial of exit-incentive benefits to employees considered its "critical resources" where plan gave discretionary authority to company to determine eligibility); *Dzinglski*, 875 F.2d at 1076 (benefit not payable if Company determines "suitable long term employment" exists); *Hamilton*, 945 F.2d at 77 (company reserved right to alter, reduce, or eliminate benefit, individually or generally); *Berger*, 911 F.2d at 914 (in Company's "interest"); *Bair v. General Motors Corp.*, 895 F.2d 1094, 1097 (6th Cir. 1990) (employee's participation in special retirement program determined "only if [GM] management first decides to permit [participation]"); *McNab v. General Motors Corp.*, 987 F. Supp. 1115, 1119 (S.D.Ind. 1997), *aff'd*, 162 F.3d 959 (ad hoc determination by management committee that employees "needed to continue the operation, pending sale of the unit to another company.")

Furthermore, as the Court said in *McNab*, there is nothing wrong under ERISA in giving a company discretion to award or withhold benefits based on the perceptions of managers. 162 F.3d at 961. As was said in *McNab*:

> Flexibility is doubtless the reason GM adopted a standard rather than a rule; flexible administration therefore cannot be the program's undoing, or we have simply used an under-the-table method to make discretion unlawful, contradicting the conclusion that ERISA permits discretionary plans.

Id. at 962.

Petitioners' contention that the criteria for applying discretion be pinpointed is inconsistent with a long line

of precedent that supports and reinforces ERISA's objective of maintaining this objective of flexibility, *e.g.*, *Administrative Committee v. Robinson*, 164 F.3d 981 (6th Cir. 1999) (limiting discretion to only terms explicitly defined would undermine the plan's discretionary powers or "require companies to write interminably long plans . . . "); *McNab*, 162 F.3d 959 (ad hoc determination by committee); *Sengpiel*, 156 F.3d at 663 (random selection); *Adams v. LTV Steel*, 936 F.2d at 369 ("mutually satisfactory conditions"); *Adams v. Avondale Industries, Inc.*, 905 F.2d at 945 (ad hoc determination of need for employees in pending sale of division); *Berger*, 911 F.2d at 918 (company's early retirement and severance benefits plan implemented only for persons whose departure was in parties' "mutual interest"); *Hlinka*, 863 F.2d at 283 (in either party's "interest").

Petitioners cite *Anderson v. Ciba-Geigy*, 759 F.2d 1518 (11th Cir.) *cert. denied*, 474 U.S. 995 (1985) to support their contention that T&B's decision was subject to fiduciary standards. That case provides no support for that proposition. In *Anderson*, the severance plan was structured to allow a management committee to use its discretion to determine when "special situations" existed precluding application of its severance policy (even where employees were not terminated for cause). It did, and the *court upheld the determination*. The court held that the employer's determination was not for any pretextual reason.

Likewise, in the instant case, there was an exercise of discretion and the Third Circuit found it was not pretextual. Indeed, The Third Circuit found that the Company's actions in light of its "unassailable business decision" to

move was sincere and reasonable. Petitioners' reference to *Anderson's* statement on "administration" is taken wholly out of context. Plaintiffs there had contended that the manager exercising the discretion was not authorized to implement the decision because he was not a named member of the management committee. The court found that he had been orally delegated the duties of a fiduciary. The court did not rule on whether his exercise of the duties was a fiduciary act subject to 29 U.S.C. § 1104, only that it was enforcible because it was "not done in bad faith." 759 F.2d at 1522.

Petitioners also contend that the manager, Kevin Dunnigan, was acting under a conflict of interest that caused him to resolve the conflict by ignoring participants. There was no conflict of interest that ERISA did not contemplate and permit. First, the plan was structured so that the terminating manager's broad discretion was an integral part of the benefit. *See, e.g., Hamilton*, 945 F.2d at 77. Second, Mr. Dunnigan did not "ignore" participants; while he was motivated to keep the engineers with the Company with incentives to prevent a wholesale exodus of that staff, those objectives served the interest of many other participants of the plan, including the employees and other personnel who relied upon those engineers to maintain the technical capacity of the Company to assist them in their work.

Even if a conflict is a factor, which it was not, courts have consistently held that management does not violate ERISA laws when it takes a course of action which reasonably best promotes the interest of all the plan participants, simply because it benefits the company, *e.g., Spink*, 517 U.S. at 893; *Fletcher v. Kroger Co.*, 942 F.2d 1137, 1140

(7th Cir. 1991); *Morse*, 732 F.2d 1139. ERISA requires that the plan be maintained with an eye toward the best interests of the collective body of participants and beneficiaries, not just one individual employee. *Siskind*, 47 F.3d at 507 (company viewed as participant that shares employees' interest in maintaining financial security); *Izzarelli*, 24 F.3d at 1523. Therefore, it is perfectly proper to consider the impact payment of benefits will have on the remaining participants and and *all* the beneficiaries. *Woolsey v. Marion Laboratories*, 934 F.2d 1452, 1458 (10th Cir. 1991); *Severs v. Allied Constr. Services Inc.*, 795 F.2d 649 (8th Cir. 1986) (conditioning payments on covenants not to compete fulfilled employer's duty to all participants to preserve and maintain the plan).

CONCLUSION

For the reasons given above, Respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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